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FILED
APR 16 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1239

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET YOUNG,

*Petitioner,*

v.

JOHN LEHMAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITIONER'S REPLY BRIEF

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Petitioner urges that the decision of the Fourth Circuit be vacated, and the case vacated for further proceedings in light of Anderson v. City of Bessemer City., No. 83-1623 (March 19, 1985).

Less than a month ago this Court held that the Fourth Circuit "Court of Appeals misapprehended and misapplied the clearly erroneous rule." Anderson v. City of Bessemer City (Slip opinion, p. 1). This case was decided by the same Court of Appeals whose misunderstanding of Rule 52 was delineated and reversed by this Court in Anderson. When the instant case was decided by the Fourth Circuit in January, 1985, the misapprehension of Rule 52 embodied in the court of appeals' opinion in Anderson stood uncorrected, and was the controlling law of that circuit. Respondent suggests that the court of appeals, even had it been aware that the Fourth Circuit decision in Anderson had misconstrued Rule 52, would have decided this case the same way. There is, we urge, no reason to engage in such speculation regarding how this case would have been

decided had the Fourth Circuit had the advantage of this Court's decision in Anderson. The decision below should be vacated and remanded to the court of appeals with instructions to consider the matter further in light of Anderson. Petitioner's right to have this case reconsidered under the correct legal standard cannot be denied merely because respondent predicts that it would prevail on remand.

The trial court in this case, having had an opportunity to hear the testimony and observe the demeanor of the defense witnesses, concluded that their explanation of why petitioner was not promoted was "unworthy of credance". (Pet. App. 32a) and that their testimony was "a poorly disguised effort" to cover their

actual motivation. (Pet. App. 29a). Anderson concluded that such findings regarding credibility are entitled to

> even greater deference . . . . For only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's . . . belief in what is said. (Slip opinion, p. 10).

The court of appeals in the instant case, writing prior to Anderson, gave no deference whatever to the district judge's assessment that the defense witnesses were not telling the truth. Respondent suggests that other evidence in this case might overcome even the ordinarily conclusive trial court credibility assessments; but whether the court of appeals would have agreed with that contention we cannot know, since the Fourth Circuit, understandably unaware of the then forthcoming

decision in Anderson, did not of course purport to apply the "greater deference" standard there announced.

Respondent suggests that the trial judge erred because he "ignored" certain defense evidence. (Mem. Resp. 3, 4, 5). The Fourth Circuit, however, did not remand this case to the trial judge for reconsideration in light of any "ignored"" evidence. Rather than affording the district court an opportunity to reconsider any such evidence, the appellate court simply made its own de novo evaluation of the record. That was precisely the practice condemned by this Court in Pullman-Standard v. Swint, 456 U.S. 273 (1982). In Swint the Fifth Circuit, having concluded that the lower ocurt had failed to consider certain evidence bearing on the bona fides of a seniority system, 456 U.S. at 282, proceeded to make

its own findings of fact. This Court reversed, holding that in such a situation "the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." 456 U.S. at 291. That rule should be applied here as well.

Respondent insists that even under the standards announced in Anderson the district court committed clear error. We do not ask this Court to resolve that question, or to reject on the merits the respondent's contentions. We ask only that this Court remand this case to the Fourth Circuit and thus afford to both petitioner and respondent an opportunity to present their arguments regarding the applicability of Anderson to the particular circumstances of this case.

## CONCLUSION

For the above reasons, the Court should grant the petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of Anderson v. City of Bessemer City.

Respectfully submitted,

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